



**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION**

MARTAVIOUS MERCERY,
Petitioner,

vs.

S. W. PHELPS, *Warden*,
Respondent.

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CIVIL ACTION NO. 8:20-4126-MGL-JDA

**ORDER ADOPTING THE REPORT AND RECOMMENDATION
AND GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

Petitioner Martavious Mercery (Mercery) filed this 28 U.S.C. § 2241 petition (the petition) against Respondent S. W. Phelps, Warden (Phelps). Mercery is self represented.

The matter is before the Court for review of the Report and Recommendation (Report) of the United States Magistrate Judge suggesting Phelps's motion to dismiss or, in the alternative, for summary judgment, be granted and the petition be denied. The Report was made in accordance with 28 U.S.C. § 636 and Local Civil Rule 73.02 for the District of South Carolina.

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261, 270 (1976). The Court is charged with making a de novo determination of those portions of the Report to which specific objection is made, and the Court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

The Magistrate Judge filed the Report on May 13, 2021, but Mercery failed to file any objections. “[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must ‘only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.’” *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note). Moreover, a failure to object waives appellate review. *Wright v. Collins*, 766 F.2d 841, 845-46 (4th Cir. 1985).

The Court notes that, inasmuch as Phelps, in his motion, relies on matters outside of the pleadings, which the Court has not excluded, the Court will construe his motion as one for summary judgment. *See* Fed. R. Civ. P. 12(d) (“If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the [C]ourt, the motion must be treated as one for summary judgment under Rule 56.”).

After a thorough review of the Report and the record in this case pursuant to the standard set forth above, the Court adopts the Report and incorporates it herein. Therefore, it is the judgment of this Court Phelps’s motion for summary judgment is **GRANTED**, and the petition is **DENIED**.

To the extent Mercery moves for a certificate of appealability, such request is **DENIED**.

IT IS SO ORDERED.

Signed this 30th day of June, 2021, in Columbia, South Carolina.

s/ Mary Geiger Lewis

MARY GEIGER LEWIS

UNITED STATES DISTRICT JUDGE

NOTICE OF RIGHT TO APPEAL

Mercery is hereby notified of the right to appeal this Order within sixty days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.